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# In the Supreme Court of the United States

No. 357

GORDON LARSEN,
*Petitioner,*

vs.

STATE OF IDAHO,
*Respondent.*

# PETITION FOR WRIT OF CERTIORARI

TO OBTAIN REVIEW OF A FINAL JUDGMENT FROM THE SUPREME COURT OF THE STATE OF IDAHO, A COURT OF LAST RESORT IN THE STATE OF IDAHO

VELSON K. SMITH
Boise, Idaho
J. M. LAMPERT
Boise, Idaho
(Member of the Bar of the Supreme Court of the United States)
*Attorneys for Petitioner*

FRANK BENSON
Attorney General
State of Idaho
WILLIAM C. ROSEN
Prosecuting Attorney
Ada County, Idaho
*Attorneys for Respondent*

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# In the Supreme Court of the United States

GORDON LARSEN,
*Petitioner,*

vs.

STATE OF IDAHO,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

COMES NOW, The above named petitioner, Gordon Larsen, by and through his attorneys, and files this petition for writ of certiorari for purposes of obtaining a review by this Honorable Supreme Court of the United States of America of that certain judgment of the Supreme Court of the State of Idaho, being a court of last resort in the State of Idaho, in a criminal case wherein judgment of conviction of the petitioner upon a charge of a felony was affirmed, and in accordance with Rule 23, Revised Rules of the Supreme Court of

the United States of America, the petitioner sets forth the following:

A. The decision of the case sought to be reviewed is entitled "State of Idaho, Plaintiff, vs. Gordon Larsen, Defendant," reported in 337 P. 2d. 1. The above decision is a decision of the Supreme Court of the State of Idaho, which court is a court of last resort of the State of Idaho. The decision of said case has not yet been recorded in the official Idaho Reports, but a copy of such original opinion, dated February 20, 1959, is attached hereto in the appendix at page 36. The opinion of the court denying the petition for rehearing is cited at Vol. 337, P. 2d. page 6. The opinion denying the petition for rehearing is not yet published in the official Idaho Reports, but a copy thereof dated April 2, 1959 is attached hereto in the appendix at page 53.

B. A concise statement of the ground on which jurisdiction of this court is invoked is as follows:

(i) The original decision in the above entitled action was filed in the Supreme Court of the State of Idaho on the 20th day of February, 1959. By the rules of the Supreme Court of the State of Idaho, a decision of the Court does not become final and is not entered until after the expiration of twenty (20) days in order to allow time for the filing of a petition for rehearing.

(ii) Within twenty (20) days the defendant filed a petition for rehearing and on April 2, 1959 the petition for rehearing was denied. Under the rules of the Supreme Court of the State of Idaho, a remittitur is then returned to the District Court from which the original judgment is appealed. This remittitur was

mailed to the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, on the 2nd day of April, 1959. Following the order denying the petition for rehearing, petitioner again sought review in the Supreme Court of the State of Idaho of the single identical issue involved in this writ of certiorari by filing with the Supreme Court of the State of Idaho a motion to recall the remittitur upon the grounds that the Supreme Court of the State of Idaho decided a question involving due process of law in a manner which was inconsistent with the decisions of the Supreme Court of the United States of America, the Supreme Courts of the sister states, and the Supreme Court of the State of Idaho itself. An order denying the motion to recall the remittitur was entered on May 13, 1959. On June 29, 1959 the petitioner filed with the Clerk of the Supreme Court of the United States a notice of filing petition for writ of certiorari, motion for extension of time for the preparation of the record and for printing petition for writ of certiorari, a copy of the praecipe to bring up a certified record from the Supreme Court of the State of Idaho, and tendered to the Clerk of the Supreme Court of the United States a filing fee of $100.00. On the 29th day of June, 1959, an order extending time for filing petition for writ of certiorari was entered in the Supreme Court of the United States extending the time for filing petition to and including the 31st day of August, 1959.

(iii) The statutory provisions believed to confer on this court jurisdiction to review the judgment or de-

cision in question by writ of certiorari are 28 U.S.C.A., Sec. 2101 (c), as provided in Rule 38 1/2, Supreme Court Rules of the United States of America, and Revised Rules of the Supreme Court of the United States, Nos. 19, 22 and 23.

Questions presented for review are as follows:

1. In a criminal prosecution when the defendant takes the stand and denies accusations made against him, may the Prosecuting Attorney, upon cross-examination, propound a series of leading questions under the guise of laying a foundation for impeachment of the defendant, including in each of such questions the implication that the defendant has previously made prior inconsistent statements to the Prosecuting Attorney himself, and, then when the defendant denies that he (the defendant) made such prior inconsistent statements to the Prosecuting Attorney, may the Prosecuting Attorney simply drop the matter, leaving with the jury the implication that the defendant must have made such prior inconsistent statements to the Prosecuting Attorney, or otherwise the Prosecuting Attorney would not have asked such questions; or,

2. Shall it be the rule of law that if the Prosecuting Attorney undertakes to lay such a foundation for impeachment by asking such leading questions, implying supposed prior inconsistent statements, and the defendant denies the making of such prior inconsistent statements, the Prosecuting Attorney must take the stand himself, or produce other witnesses to such effect, subject to the right of cross-examination of such wit-

nesses by the defendant and subject to the oath of perjury, and for failure of such Prosecuting Attorney to follow up the impeaching evidence itself, such failure shall constitute prejudicial error and denial of due process of law?

3. Especially in a criminal case, shall the Prosecuting Attorney be permitted, under the guise of laying a foundation for impeachment, ask a series of leading questions implying in each question that the defendant had admitted to the Prosecuting Attorney that he had engaged in numerous similar acts, and then when the defendant denies the implications of such leading questions, may the Prosecuting Attorney simply drop the matter, leaving the inferences with the jury that the defendant must be a confirmed and habitual violator of the law in this particular regard, or otherwise the Prosecuting Attorney would never have suggested in his questions that the defendant had made such prior admissions to the Prosecuting Attorney? or,

4. Does due process of law require that if a Prosecuting Attorney shall elect to lay a foundation for impeachment by asking the defendant if the defendant had made prior admissions and inconsistent statements, and the defendant denies having made such prior admissions and inconsistent statements, the Prosecuting Attorney must be prepared to produce evidence under oath and subject to the pains of perjury and subject to the right of cross-examination, that such prior inconsistent statements and admissions were in fact made, and for failure to follow up with the impeaching evidence itself, the same shall constitute re-

versible and prejudicial error and a denial of due process of law; or

5. Does due process of law mean that if the defendant takes the stand he does so at his own peril and hazard and that the limits to which the Prosecuting Attorney may defame and prejudice the defendant through the inferences of leading questions, propounded under the guise of laying a foundation for impeachment, be limited only to the conscience and bounds of the ingenuity of the Prosecuting Attorney to devise and propound power-packed questions inferring that the defendant had previously made prior inconsistent statements and admissions to the Prosecuting Attorney himself; and thereby leave with the jury the implication that such must have been true, otherwise, the duly elected and quasi judicial officer, known as the Prosecuting Attorney, would never have implied such a thing by his questions.

6. Particularly in this case where the defendant was charged with the offense of having committed the infamous crime against nature, and the defendant took the stand and expressly denied that he was an homosexual as previously testified to by one of the plaintiff's witnesses, and further denied that he had committed the act of homosexuality as previously testified to by one of the State's witnesses, may the Prosecuting Attorney on cross examination ask the defendant a long series of questions under the guise of laying a foundation for impeachment, implying in some of such questions that the defendant had admitted to the Prosecuting Attorney himself that he (the defendant) was an

homosexual, implying in other questions that the defendant had admitted to the Prosecuting Attorney as to how he allegedly got started as an homosexual and implying in numerous other such questions that the defendant had admitted having had homosexual acts with numerous other named individuals, and then when the defendant denied that he had ever made such a statement to the Prosecuting Attorney, is it not a denial of due process of law to permit the Prosecuting Attorney to simply drop the matter thereby implying to the jury that the defendant must have adimitted such acts and facts to the Prosecuting Attorney, otherwise the Prosecuting Attorney would never have suggested or implied such a thing by his questions; or,

7. In this case when the defendant denied having made such statements to the Prosecuting Attorney, does not the guaranties of a fair and impartial trial with due process of law require that the Prosecuting Attorney himself should have taken the stand or he should have placed some other witness on the stand, subject to the penalty of perjury and subject to the right of cross-examination to testify to the fact that the defendant either did or did not in fact make such prior statements and admissions?

D. The constitutional provisions of the United States of America and the statutes and rules involved in the case are as follows:

AMENDMENT 14 CONSTITUTION OF THE UNITED STATES (Sec. 1)

"All persons born or naturalized in the United

States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; *nor shall any state deprive any person of life, liberty or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws."

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PAGE 11 (Rule 63)

"In criminal cases when a decision is filed by this court the clerk shall immediately notify the respective counsel in writing of such fact and the date thereof. In case a petition for rehearing shall be filed, judgment shall not be entered by the clerk until ordered by the court. *If a petition for rehearing be not filed upon the expiration of twenty days from the filing of such decision*, judgment shall be entered upon the minutes of the court in accordance therewith and a certified copy thereof forthwith remitted to the clerk below."

E. A concise statement of the case containing the facts material to a consideration of the questions presented is as follows:

In this case the petitioner was charged and tried upon the accusation that he, the said petitioner, a male person of the age of 31 years, committed the infamous crime against nature with another male person of the age of about 21 years by the name of Eldon Halverson.

Upon the trial of said charge the said Eldon Halverson testified, over the objections of the defendant, to

the effect that he (Eldon Halverson) knew that the petitioner was an homosexual:

Further, the said Eldon Halverson testified and claimed that he, the said Eldon Halverson, had engaged in an homosexual relationship with the petitioner.

Upon taking the stand, the petitioner denied that he was an homosexual and denied that he had ever had an homosexual relationship with Eldon Halverson.

Upon cross-examination of the defendant himself, the Prosecuting Attorney sought to lay a foundation for the impeachment of the petitioner to show prior inconsistent statements and the questions and answers thereto were as follows:

"Q. Now, while you were sitting in Mr. Thomas' office, the prosecutor's office, when I came in, you recall I came in and talked to you there for a minute?

A. No, I don't remember that. I remember Mr. Quinton saying that when he was up here, but I don't remember of you coming in.

Q. Don't you remember when I came and we talked about the University of Idaho for a few minutes?

A. No, I can't remember, Blaine; really I can't remember that.

Q. And I asked you when you got started in these homosexual activities and you told me you got started in the Army?

MR. SMITH: Object to that question as being incompetent, irrelevant and no foundation laid.

THE COURT: Overruled.

Q. Do you remember that?

A. No, I don't remember that.

Q. And don't you remember that I asked you how you got started in the Army and you said you were alone with men on the post a lot and you used to go in the shower room and that's where you got started?

A. No.

Q. You don't remember that?

A. No, I don't remember that at all.

Q. Do you remember discussing with Mr. Thomas other homosexual experiences you had?

A. No; because I haven't had any, Blaine.

Q. You haven't had any other homosexual experiences?

A. No, no.

Q. Do you regard yourself as a homosexual?

A. I do not.

Q. Do you remember talking to Mr. Thomas about Bill Wilson? You know Bill Wilson, don't you?

A. No, I don't know Bill Wilson.

Q. I think he is known . . .

MR. SMITH: I object to this line of testimony as being beyond the scope of the direct examination.

THE COURT: Objection is overruled.

Q. I think he is known as Wilkard Wilson. Do you recall talking to Mr. Thomas about him?

A. No. Well, maybe he mentioned his name be-

cause I had seen his name in the paper.

Q. You had seen his name in the paper?

A. Yes.

Q. And do you remember Mr. Thomas asked you about Willard Wilson?

A. No, I can't remember.

Q. And don't you remember that you told him that you and Willard Wilson had had three homosexual experiences?

A. I certainly do not.

Q. You don't remember that?

A. I do not.

Q. Do you remember telling Mr. Thomas that you used to frequent bars and men would pick you up in the bar and you would have a homosexual affair with them?

A. I certainly do not.

Q. You don't remember that at all?

A. No.

Q. Do you remember talking about Mel Dir and Joe Gough and Alma Farnsworth?

A. No.

Q. Never talked about any of them. How long were you in the office with Mr. Thomas?

A. Oh, it must have been a couple of hours.

Q. During this entire two hours all you ever talked about was this one affair with Eldon Halverson—is that right?

A. That's right.

Q. Don't you remember that you said that usually you had these affairs after you had had a few

drinks of whiskey?" (line 8, page 143 through line 15, p. 145, Tr.)

It appearing from the record that the petitioner had denied that he was an homosexual and having further denied that he had had an homosexual experience with Eldon Halverson, it was perfectly proper, material and relevant for the Prosecuting Attorney to show that the petitioner had allegedly made prior inconsistent statements in this regard and in order to impeach the petitioner, it was perfectly proper, material and relevant for the Prosecuting Attorney to lay a foundation while the petitioner was upon the stand in order to subsequently show the prior inconsistent statements if the petitioner himself denied having made such prior inconsistent statements. However, after the petitioner denied each and every of these attempted impeaching questions, the Prosecuting Attorney failed completely to show his good faith in propounding such impeaching questions by following up petitioner's denials with affirmative proof that the petitioner had made such statements, and, therefore, committed highly prejudicial and reversible error by leaving with the jury the inference that the petitioner must have made such statements to the Prosecuting Attorney and to his assistant or otherwise the Prosecuting Attorney would not have so inferred that the petitioner had made such admissions by the foregoing questions. It was and is contended that this procedure and practice on the part of the Prosecuting Attorney under the circumstances amounted to a complete denial of due process of law and a fair and impartial trial under the constitution

of the United States of America. The record and transcript of the testimony of the trial will disclose that these alleged admissions were made to the Prosecuting Attorney himself in the presence of his deputy, Mr. Eugene Thomas, and in the presence of at least one police officer. After the defendant denied having made such admissions, neither the Prosecuting Attorney nor his deputy assistant nor the police officer were called as a witness to testify affirmatively to the fact that such admissions were made and to testify under oath and subject to punishment for perjury and to be subject to the right of cross-examination by the petitioner to show interest, bias or prejudice, but instead the damaging effect was left strictly through inference from the fact that it was the Prosecuting Attorney himself, who was inferring by the questions that such prior inconsistent statements were made to him, the Prosecuting Attorney.

F. It is contended that the circumstances outlined in paragraph (E), above, demonstrate and amount to a denial of due process of law and a denial of a fair and impartial trial.

As provided by Section 19-2406, I.C., a new trial in the District Court may be granted when the court has erred in the decision of any question of law arising during the course of the trial. This motion for new trial must be filed within 10 days, as provided by Sec. 19-2407, I.C. Within the said 10 days the petitioner did make a motion for new trial and assigned as error the conduct of the Prosecuting Attorney in propounding the impeaching questions as outlined in paragraph

(E), above, and after receiving negative answers to such impeaching questions, he refused and failed to submit any affirmative evidence to prove that the petitioner did in fact make such prior inconsistent admissions. (See, paragraphs I and II of the motion for new trial appearing at pages 235-239 of the Transcript of the evidence, certified to this Honorable Supreme Court by the Clerk of the Supreme Court of the State of Idaho.)

The motion for new trial having been denied, petitioner appealed the judgment of conviction to the Supreme Court of the State of Idaho claiming 24 alleged errors, among which was an assignment of error based upon the facts and circumstances outlined in (E), above, said assignment of error being as follows:

"That such conduct was particularly unwarranted, unfair, prejudicial and reversibly erroneous when, after the defendant's repeated denials, the Prosecuting Attorney sheepishly and cowardly declined to take the stand to testify to such facts under oath and under punishment for perjury, and to give the defendant the opportunity to show the interest and bias of the Prosecuting Attorney, and to cross-examine him to show the exaggeration and untruthfulness of such extended, repeated and prejudicial insinuations, which, when left as they were, amounted to evidence in the minds of the jury that the defendant had made such admissions." (p. 39, appellant's brief) Certified to the Honorable Supreme Court by the Clerk of the Supreme Court of Idaho.

This assignment of error is set forth more in detail

and in full under assignment of error X (c), appearing at pages 35 through 39 of appellant's brief, certified to this Honorable Supreme Court by the Clerk of the Supreme Court of the State of Idaho.

In passing upon this assignment of error, the Supreme Court of the State of Idaho in its decision dated February 20, 1959, held as follows:

"The appellant further urges there was error in the trial court's permitting certain questions directed to the defendant by the prosecuting attorney, and in allegedly inflammatory remarks by the prosecutor in his argument to the jury.

> "The questions dealt with matters opened up by defense counsel, and the defendant cannot now be heard to complain thereof.
>
> "The rule would seem to be well settled that where a defendant in a criminal trial voluntarily takes the witness stand in his own behalf he is subject to the same rules applicable to other witnesses and may be cross-examined in regard to all matters to which he has testified on his direct examination or connected therewith.
>
> State v. Hargraves, 62 Idaho 8, 107 P. 2d 854.
>
> See also State v. Wilson, 41 Idaho 616 at pp. 629-630, 243 P. 359; State v. Martinez, 43 Idaho 189, 195, 250 P. 239; State v. Mundell, 66 Idaho 297 at pp. 306-308, 158 P. 2d 818."

It appearing that the Supreme Court of the State of Idaho had missed the significance of this assignment of error and had decided the assignment of error with

wholly inapplicable reasons, the petitioner filed a petition for rehearing and after having cited therein the above quoted portion of the decision of the Supreme Court of the State of Idaho to which exception was taken, petitioner in his petition for rehearing assigned as follows:

"In its decision the court approved the line of cross-examination that was conducted by the Prosecuting Attorney when the defendant was on the stand and contended, 'The questions dealt with matters opened up by defense counsel and the defendant cannot now be heard to complain thereof.' That was not the basis of the assignment of error, nor was there any authorities attempted to be submitted along that line nor did the defendant ever argue along that line. The issue involved was that after the defendant had taken the stand and testified in his own defense, and in so testifying stated that he, the defendant, was not an homosexual, the prosecutor undertook to engage in a long series of questions in which questions the prosecutor implied that the defendant had admitted to the Prosecuting Attorney that he, the defendant, had had numerous homosexual engagements and experiences. The defendant denied that he ever made any such statement to the Prosecuting Attorney. The Prosecuting Attorney did not take the stand, nor did he produce any other witnesses "to rebut the defendant's denials along these lines. Such conduct on the part of the Prosecuting Attorney has been held reprehensible and reversible error in many of the Supreme Courts as will appear from the brief filed in support of this petition."

(See p. 2, petition for rehearing.) Certified to the Honorable Supreme Court, by the Clerk of the Supreme Court of Idaho.

On April 2, 1959, the Supreme Court of the State of Idaho denied this petition for rehearing and the entire text of the decision was as follows:

> "In the petition for rehearing, appellant urges a reversal because of what is termed impeaching examination of appellant by the prosecutor without adducing evidence in support thereof. Two objections were made during this examination: one that a particular question was incompetent, irrelevant, and no foundation laid, and later on a second objection that the testimony was beyond the scope of the direct examination, although admittedly invited by the direct examination of defendant. Both objections were overruled.
>
> "This Court has held that where impeaching questions are not objected to, and no adverse rulings obtained, there is no error. State v. Boyatt, 59 Idaho 771, 87 P. 2d. 992.
>
> "The petition for rehearing is denied."

It still appearing that the Supreme Court of the State of Idaho was missing the significance of this assignment of error and that the Supreme Court was basing its decision upon wholly inapplicable decisions and reasoning, the petitioner filed a motion for recall of remittitur on May 12, 1959, and among other things, assigned as reason for such recall of the remittitur as follows:

"1. That the above portion of the decision dated February 20, 1959 and the above set forth portion of the decision on petition for rehearing is not supported by the record of the evidence in this case.

"2. That the above decisions in this said case in the light of the testimony and transcript of the evidence is not supported by former decisions of this Honorable Supreme Court, and is out of harmony with and is irreconcilable with the former decisions of this said Honorable Supreme Court and the rulings of other majority decisions in other courts of the United States concerning the abuses of the prosecuting attorneys who ask material questions as impeaching questions, to which such questions there is no logical or legal objection, which could be made thereto by the defendant, but who after asking such questions and receiving a negative answer thereto, fails to follow up such impeaching questions by impeaching evidence."

On May 13, 1959, the Honorable Supreme Court of the State of Idaho summarily entered an order denying petitioner's motion to recall remittitur.

The complete decision of the Supreme Court of the State of Idaho filed February 20, 1959, the entire text of the petition for rehearing, the complete text of petitioner's brief in support of petition for rehearing, the complete text of the order of the Supreme Court denying the petition for rehearing, the complete text of the

motion for recall of remittitur, the complete text of the brief in support of the motion for recall of the remittitur, and the complete text of the order denying petitioner's motion to recall remittitur are included in the certified transcript of the record to this Honorable Supreme Court of the United States by the Clerk of the Supreme Court of the State of Idaho.

G. Not applicable.

H. As for an argument amplifying the reasons relied on for allowance of this writ of certiorari, petitioner states as follows:

At the time of the alleged occurence of the allegedly crime, the petitioner was a male person of the age of 32 years, single, but betrothed for marriage. It was charged and claimed that the defendant had indulged in an homosexual act with another male person of the age of about 21 years by the name of Eldon Halverson.

At the trial Eldon Halverson was asked over the objection of the defendant as to whether or not he knew that the defendant was an homosexual person, as follows:

> "Q. And he was known to you as a homosexual?
>
> (Objection by defendant overruled by court.) * * *
>
> Q. Yes, go ahead and answer.
>
> A. Yes." (lines 21-28, p. 48; Tr.)

*And:*

> "Q. So when you saw the defendant Gordon Larsen on the streets of Boise on October 3rd and he approached you, you knew at that time that he was a homosexual?

A. Yes.

*** (Objection by defendant overruled by court and answer ordered to stand) ***

Q. You did?

A. Yes." (lines 9 through 19, p. 49, Tr.)

Further, in the course of his testimony Eldon Halverson stated unequivocally that he and the defendant had committed an homosexual act with each other in Boise City, Ada County, Idaho on or about the 3rd day of October, 1955.

After the State had rested, the defendant himself took the stand and unequivocally denied that he was an homosexual person. The defendant further unequivocally denied that he had ever had the homosexual experience with the alleged accomplice Eldon Halverson.

In this state of the record this petitioner frankly admits that after he, (the petitioner) had denied that he was an homosexual person and after he had denied that he had ever had an homosexual experience with Eldon Halverson or anyone else, the Prosecuting Attorney had an absolute right to show that such facts were not true and this right on the part of the Prosecuting Attorney himself included the right to show that the defendant had made some prior inconsistent statements or admissions to the Prosecuting Attorney or to someone else from which it would appear that the defendant was not telling the truth when he stated under oath that he was not an homosexual person and when he stated under oath that he had never had an homosexual experience with Eldon Halverson or anyone else.

It was apparently upon this theory that the Prosecuting Attorney felt free to lay a foundation for impeachment by asking the defendant whether or not he had ever made such prior inconsistent statements or admissions, and in doing so, the Prosecuting Attorney laid a foundation as to the time and place when such supposed prior inconsistent statements and admissions were supposed to have been made, and then proceeded to ask the defendant whether or not he did not say such a thing. The questions and answers propounded were as follows:

"Q. Now, while you were sitting in Mr. Thomas' office, the prosecutor's office, when I came in, you recall I came in and talked to you there for a minute?"

A. No, I don't remember that. I remember Mr. Quinton saying that when he was up here, but I don't remember of you coming in.

Q. Don't you remember when I came and we talked about the University of Idaho for a few minutes?

A. No, I can't remember, Blaine; really I can't remember that.

Q. And I asked you when you got started in these homosexual activities and you told me you got started in the Army?

MR. SMITH: Object to that question as being incompetent, irrelevant and no foundation laid.

THE COURT: Overruled.

Q. Do you remember that?

A. No, I don't remember that.

Q. And don't you remember that I asked you how you got started in the Army and you said you were alone with men on the post a lot and you used to go in the shower room and that's where you got started?

A. No.

Q. You don't remember that?

A. No, I don't remember that at all.

Q. Do you remember discussing with Mr. Thomas other homosexual experiences you had?

A. No; because I haven't had any, Blaine.

Q. You haven't had any other homosexual experiences?

A. No, no.

Q. Do you regard yourself as a homosexual?

A. I do not.

Q. Do you remember talking to Mr. Thomas about Bill Wilson? You know Bill Wilson, don't you?

A. No, I don't know Bill Wilson.

Q. I think he is known—

MR. SMITH: I object to this line of testimony as being beyond the scope of the direct examination.

THE COURT: Objection is overruled.

Q. I think he is known as Willard Wilson. Do you recall talking to Mr. Thomas about him?

A. No. Well, maybe he mentioned his name because I had seen his name in the paper?

Q. You had seen his name in the paper?

A. Yes.

Q. And do you remember Mr. Thomas asked you about Willard Wilson?

A. No, I can't remember.

Q. And don't you remember that you told him that you and Willard Wilson had had three homosexual experiences?

A. I certainly do not.

Q. You don't remember that?

A. I do not.

Q. Do you remember telling Mr. Thomas that you used to frequent bars and men would pick you up in the bar and you would have a homosexual affair with them?

A. I certainly do not.

Q. You don't remember that at all.

A. No.

Q. Do you remember talking about Mel Dir and Joe Gough and Alma Farnsworth?

A. No.

Q. Never talked about any of them. How long were you in the office with Mr. Thomas?

A. Oh, it must have been a couple of hours.

Q. During this entire two hours all you ever talked about was this one affair with Eldon Halverson—is that right?

A. That's right.

Q. Don't you remember that you said that usually you had these affairs after you had had a few drinks of whiskey?" (line 8, p. 143 through line 15, p. 145, Tr.)

This line of cross-examination was assigned as error as assignment of error No. 10(c) (pp. 35-39, appellant's opening brief) as follows:

> "* * * That such conduct was particularly unwarranted, unfair, prejudicial and reversibly erroneous when, after the defendant's repeated denials, the Prosecuting Attorney sheepishly and cowardly declined to take the stand to testify to such facts under oath and under punishment for perjury, and to give the defendant the opportunity to show the interest and bias of the Prosecuting Attorney, and to cross-examine him to show the exaggeration and untruthfulness of such extended, repeated and prejudicial insinuations, which, when left as they were, amounted to evidence in the minds of the jury that the defendant had made such admissions." (p. 39, appellant's opening brief)

In deciding this assignment of error the Supreme Court of Idaho in its decision filed February 20, 1959, stated as follows:

> "The appellant further urges there was error in the trial court's permitting certain questions directed to the defendant by the prosecuting attorney, and in allegedly inflammatory remarks by the prosecutor in his argument to the jury.
>
> "The questions dealt with matters opened up by defense counsel, and the defendant cannot now be heard to complain thereof.

> The rule would seem to be well settled that where a defendant in a criminal trial voluntarily takes the witness stand in his own behalf he is subject to the same rules applicable to other witnesses and may be cross-examined in regard to all matters to which he has testified on his direct examination or connected therewith. State v. Hargraves, 62 Idaho 8, 107 P. 2d. 854. See also State v. Wilson, 11 Idaho 616 at pp. 629-630, 243 P. 359; State v. Martinez, 43 Idaho 180, 195, 250 P. 239; State v. Mundell, 66 Idaho 297 at pp. 306-308, 158 P. 2d. 818."

A petition for rehearing was thereafter filed and it was pointed out to the Supreme Court of Idaho that there was absolutely no question but that the defendant had taken the stand and had denied that he had ever had an homosexual experience with Halverson. Had denied that he had ever had an homosexual experience with anyone. Had denied that he was an homosexual as he had been accused of being an homosexual while Halverson was on the stand. In other words, Halverson stated that he had had an homosexual experience with the defendant. It was perfectly material and relevant, and, for that matter, was indispensably necessary, for the defendant to deny that he had ever had an homosexual experience with Halverson, if in fact the defendant had not had such an homosexual experience. The witness Halverson had also testified that when he had seen Gorden Larsen on that day that he, Halverson, knew that Larsen was an homosexual. It was,

therefore, material and relevant, and for that matter indispensably necessary, that the defendant deny that he was an homosexual, if in fact he was not an homosexual. It was, therefore, perfectly proper for the prosecuting attorney to then show any evidence at his disposal, which would tend to impeach Larsen's claim that he was not an homosexual person and his claim that he had never had any homosexual experiences with anyone, including Halverson.

In our petition for rehearing we pointed out that the court was absolutely missing the point, which we were urging under this assignment of error. The question *involved was not whether or not the defendant had opened up the subject because we freely admitted that the State accused the defendant of these homosexual acts and accused the defendant of being an homosexual and the defendant denied it.* What we were complaining about in the assignment of error is that the prosecuting attorney asked a series of impeaching questions, which, incidentally, *were perfectly material questions, perfectly relevant questions, but after having received a negative answer and a denial from the defendant that he, the defendant, had ever made such admissions, the prosecuting attorney failed and refused to take the stand or to produce someone else to take the stand to impeach the defendant.*

Apparently the Supreme Court of Idaho felt that there was merit in our petition for rehearing because the court then apparently abandoned what it had formerly said, "The questions dealt with matters opened up by defense counsel, and the defendant cannot now be

heard to complain thereof" and thereupon proceeded to give a different or another reason why this assignment of error should not be sustained as follows:

> "In the petition for rehearing, appellant urges a reversal because of what is termed impeaching examination of appellant by the prosecutor without adducing evidence in support thereof. Two objections were made during this examination: one that a particular question was incompetent, irrelevant, and no foundation laid, and later on a second objection that the testimony was beyond the scope of the direct examination, although admittedly invited by the direct examination of defendant.
>
> "This court has held that where impeaching questions are not objected to, and no adverse rulings obtained, there is no error. State v. Boyatt, 59 Idaho 771, 87 P. 2d. 992. The petition for rehearing is denied."

It is the contention of the petitioner that in this state of the record there was no logical objection, which the petitioner could have made to this series of questions. The subject had been opened up and the Prosecuting Attorney had the undisputed right to follow through by laying a foundation that the defendant had not told the truth.

The petitioner denied that the Prosecuting Attorney had ever asked him such a question and denied that he, the petitioner, had ever admitted to the Prosecuting Attorney the homosexual acts inferred in the questions

of the Prosecuting Attorney.

When the defendant had rested his case, the Prosecuting Attorney made no effort whatsoever to offer to rebut the denials which were made by the defendant in the course of the above cross-examination, but instead, the Prosecuting Attorney simply left the matter rest there, implying to the jury that the petitioner must have made such admissions to the Prosecuting Attorney or otherwise the Prosecuting Attorney would not have so implied by his foundation questions for impeachment.

It is the contention of the petitioner that this situation created a substantial denial of the petitioner's right to a fair trial according to principles of due process of law. It is the contention of the petitioner that due process of law under such circumstances would have required the Prosecuting Attorney to take the stand himself or to put some other witness upon the stand under oath and under the pains of perjury and subject to the right of the defendant to cross-examine such witness to show bias, prejudice, or out and out falsehood; and for failure of the Prosecuting Attorney to follow up with the impeaching evidence, the situation created a highly prejudicial effect upon the minds of the jury, leaving the implication that such must have been the truth of the case or otherwise the Prosecuting Attorney would not have so implied by his questions.

This type of outrageous conduct on the part of Prosecuting Attorneys in criminal actions have been the subject of much litigation in the United States of

America.

In the State of Idaho this practice has been abhorred time and time again by the Supreme Court of Idaho in the following cases:

State v. Rogers, 30 Ida. 259
State v. Irwin, 9 Ida. 35
State v. Fowler, 13 Ida. 317 (323)
State v. Givens, 28 Ida. 253
State v. Douglas, 35 Ida. 140

The Supreme Courts of other states in our union have reversed and remanded decision after decision because of this type of abuse of criminal defendants on the part of Prosecuting Attorneys:

Britt v. State, Ariz. 218 Pac. 981
Walker v. State, Ariz. 201 Pac. 398 (400)
Leahy v. State, Neb. 48 NW 390
Hash v. State, Ariz. 59 P. 2d. 305 (bottom second col. p. 311)
Buel v. State, 80 NW 78 (83)
State v. Singleton, 182 P. 2d. 920 (para. 17, p. 930)

In the case of Hash v. State, 59 P. 2d. 305, the Supreme Court of Arizona stated as follows:

"(13) His twelfth reason is the misconduct of the county attorney *in putting certain impeaching questions on cross-examination of J. A. Edgar*, father of the prosecuting witness, *and failure thereafter to follow up by putting any witness on the stand to support the impeaching questions.* This witness had testified in behalf of the defend-

ant that his daughter Nora had told him that there was not a word of truth to the story, that it was a 'frame-up' and that she didn't see why the case was not thrown out. He also testified that he and the prosecuting witness were together Saturday afternoon May 11, 1935, and Saturday afternoon May 18, 1935, and every other Saturday afternoon during the month of May, 1935. The impeaching questions and answers were as follows:

'Q. Let me finish my question. I will ask you if you didn't come up to my office and in the presence of Ed Frazier a few days after the date on which the preliminary hearing was set, that is the time for the hearing, not when it was set, but a few days after the time it was set for preliminary hearing, you came up there and asked me to dismiss that case that involved your daughter, and I asked you why, and you said, 'I don't know whether he had intercourse with her or not, but if he did, he didn't get it into her womb and she is not going to be hurt by it.' Didn't you do that? A. No, sir. * * *

'Q. And didn't I at that time say to you, 'Mr. Edgar, do you mean to say that just because your daughter,' using your own language, 'That he didn't get it into her womb he shouldn't be prosecuted.' A. Absolutely not.

'Q. And didn't I say to you at that time and place in the presence of Ed Frazier that if you didn't have any respect for your own daughter you ought

to have it for any other girls that might be involved in this case? A. No, sir.'

"After these questions were put and answered the defendant moved that they be stricken on the grounds that they were (1) of no probative value; (2) argumentative in nature; (3) not put for the purpose of impeachment but to prejudice the defendant. The court overruled the motion stating, among others, its reason therefor as follows: 'It may be for use as a basis for impeachment.' *It can at once be seen that these questions must have been damaging to the defendant. Back of each was the personal guarantee of the county attorney that Edgar had stated to him all the things assumed in question. In other words, it was as though the county attorney had himself sworn and testified to such facts. Not only was his personal and official standing back of these statements, but he called in to corroborate* him Ed Frazier, deputy county attorney, a lawyer of high standing for integrity and ability. These questions were not put, as the court assumed 'as a basis for impeachment.' Their certain effect was to discredit the witness J. A. Edgar. *The county attorney, if he knows any facts, may, like any other witness, be sworn and submit himself to examination and cross-examination, but he may not obtrude upon the jury and into the case knowledge that he may possess under the guise of cross-examination, as in this case.* In the case of Britt v. State, 25 Ariz. 419, 218 P. 981, a very similar situation was pre-

sented; and we there undertook to state the rule so that the prosecuting officers of this state should clearly understand and know that such conduct would not be tolerated in this jurisdiction.

"* * * *To give sanction to the manner in which the prosecution conducted the cross-examination of defendant's witness J. A. Elgar would establish a precedent so dangerous to fair trials and the liberties of our citizens that we feel for that reason alone, the case should be retried.* And, in addition, the court committed error in some of its instructions and in its refusal to give some of the requested instructions.

"For these reasons the judgment is reversed, and the cause remanded for a new trial."

In State v. Singleton, 182 P. 2d. 920, the Supreme Court of Arizona had this subject again before it. For the sake of brevity, we urge the court to read the long cross-examination appearing at page 928. The court concluded as follows.

"(17) *But when, as here, such questioning is raised and then dropped with no further attempt on the part of the State to prove its point, the aforementioned 'fishing expedition' having failed, we believe it to be wholly improper and highly prejudicial. To allow this sort of examination would be to allow the imaginative and overzealous prosecutor to concoct a damaging line of examination which could leave with the jury the impression that defendant was anything that the ques-*

*tions, by innuendo, seemed to suggest. If the questions were persistent enough and cleverly enough framed, no amount of denial on the part of a defendant would be able to erase the impression in the mind of the jury that the prosecutor actually had such facts at hand and that probably there was some truth to the insinuations.*

"We endorse what the Supreme Court of the State of Iowa in State v. Burris, 190 Iowa 628, 190 N.W. 38, at page 41, had to say of such tactics by a prosecutor:

"'* * * it is not within the province of a prosecutor, under the pretense of affecting the credibility of the witness, to propound interrogatories *without any pretense or attempt to establish the truthfulness of the matters suggested by such inquiry and solely to cast insinuations upon the defendant. To open the doors to the cross-examination of a defendant by a proceeding of this character would leave him subject to insinuation and suggestion of gross misconduct, without any semblance of basis to support the same and with limitations fixed only by the extent of the imagination of the interrogator and his audacity in propounding the inquiries. It is no answer to say that the appellant was not prejudiced by this cross-examination because he answered the questions in the negative and no attempt was made by the state to prove the truthfulness of the matters suggested in the inquiry.*'"

And as to this matter of whether the Supreme Court

should merely "slap the hands" of the prosecuting attorneys when they indulge in such unfair practices, but refuse to reverse a case when they do indulge in such unfair practices, the Supreme Court of Arizona stated as follows in the case of Britt v. State, 218 P. 2d. 981:

> "In Watson v. State, 7 Okl. Cr. 590, 124 Pac. 1101, the court reviewed at length many of the cases wherein the misconduct of the prosecuting officer was assigned as the basis of a reversal, and closes the opinion with this language:
>
> "'Upon a careful consideration of this record, we are impelled to the conclusion that the accused did not have a fair and impartial trial. We again warn trial courts and prosecuting attorneys in this state that they must conduct the trials of criminal cases in a fair and impartial manner and according to the rules of law. The public is entitled to an impartial enforcement of its penal statutes. In the interest of the law-abiding public, this court has used every reasonable means to uphold judgments of conviction when in good conscience it could so do. *But the aversion of this court to reversing judgments of conviction must not be understood by the trial courts and the prosecuting attorneys as a license to disregard the rights of persons on trial accused of crime. The trial of criminal cases must be conducted according to law. When the record discloses that a trial has been unfair, as the record in this case does, a judgment of conviction cannot be upheld*, although

this court, with reluctance, is forced to award a new trial at the expense of the people.

"This language we appropriate, and wish to emphasize that we shall in the future, as in the past, endeavor to uphold judgments of conviction when in conscience it can be done. *Counsel, however, must not expect the court to affirm judgments secured by tactics that are unlawful and unfair.*

"The judgment is reversed, with directions that a new trial be granted."

I. There is attached to this petition copies of the following three opinions of the Supreme Court of the State of Idaho: (1) The original decision filed February 20, 1959; (2) The order denying the petition for rehearing filed April 2, 1959; (3) The order summarily denying the motion to recall the remittitur, filed May 13, 1959.

J. There is attached in the appendix a copy of the judgment of the Supreme Court of the State of Idaho, being in fact the remittitur.

Respectfully submitted,

VERNON K. SMITH
1900 Main Street.
Boise, Idaho

J. M. LAMPERT
2227 Heights Drive
Boise, Idaho
(Member of the Bar of the United States of America)

*Attorneys for Petitioner*

# APPENDIX

IN THE SUPREME COURT

OF THE STATE OF IDAHO

No. 8546

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| | |
|---|---|
| STATE OF IDAHO,<br>*Plaintiff-Respondent,*<br><br>v.<br><br>GORDON LARSEN,<br>*Defendant-Appellant.* | Boise, November Term, 1958<br>Filed February 20, 1959<br>L. J. Bidegaineta, Clerk. |

Appeal from the District Court, Third Judicial District, in and for Ada County. Hon. M. Oliver Koelsch, district judge.

Judgment of conviction of infamous crime against nature. *Affirmed.*

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Vernon K. Smith of Boise for appellant.

Graydon W. Smith, attorney general; J. R. Smead and T. J. Jones, III, assistant attorneys general; and Eugene C. Thomas, prosecuting attorney, of Boise, for respondent.

McQUADE, J.

Gordon Larsen, age 32, the defendant herein, was charged with committing an infamous crime against nature following an alleged incident involving the defendant and one Eldon Halverson, age 21, occurring October 3, 1955, in the defendant's apartment in Boise.

The charging part of the information reads as follows:

> "That the said defendant, GORDON LARSEN, a male person in Ada County, Idaho, on or about the 3rd day of October, 1955, did then and there wilfully, unlawfully and feloniously commit the INFAMOUS CRIME AGAINST NATURE by then and there wilfully, unlawfully and feloniously taking into his, the said GORDON LARSEN'S mouth, the penis of one Eldon Halverson, a mal-

human being, and then and there sucking the same."

At the time of the alleged offense, the defendant was divorced, and was employed as a produce salesman. When arrested, he was manager of the men's department of a Boise store. He was a veteran, and had attended the State university for two years. He was planning to be married.

The evidence showed a police officer contacted Larsen at his apartment December 11, 1955, and asked the defendant to go with him downtown. They went to the office of a special investigator, Bill Fairchild, the office being in Fairchild's home. Larsen was questioned by the investigator in the presence of the Ada County sheriff, the Boise police chief, and a police sergeant. The officers testified Larsen was told he was not under arrest, that he was free to leave, that he was entitled to have an attorney, and that his statements might be used against him. This was denied by Larsen.

The interview lasted from around 4 p.m. until 6:30 p.m. Larsen was questioned at length about activities of homosexuals in the city.

The defendant testified he told the officers he knew nothing about the matter. Halverson was then brought in. He identified the defendant, and told the officers he had had homosexual relations with Larsen in the latter's apartment. The defendant denied this, stating he did not know Halverson, but upon further questioning he admitted Halverson had been in the apartment with him.

The defendant was taken to the office of the Ada County prosecutor and was questioned further by the assistant prosecuting attorney, James Brandon, chief of police, who was present during this interview, testified Larsen at this time admitted the act. The assistant prosecutor, Eugene C. Thomas, wrote out a brief statement of the incident as follows:

> "This statement was given voluntarily at room 103 Ada County on the evening of December 12, 1955, in the presence of Eugene C. Thomas, James Brandon and Bill Fairchild. It is made voluntarily, without promise or duress, and with the advice that it might be used against me and that I have a constitutional right to counsel. It is given voluntarily. At about noon on or about October 3, 1955, at my apartment in Boise Hills Village in Boise, Idaho I had a homosexual experience with Eldon Halverson wherein I recall taking his penis into my mouth and he took my penis into his. Neither of us had an orgasm. My name is Gordon Larsen and I reside at Boise Hills Village in Boise, Idaho. The time is 8:30 p.m."

At Larsen's request, another sentence was added:

> "This incident involved 'playing around' and was not an attempt on my part to 'Blow' Halverson."

There was evidence at the trial the statement was wrongly dated, and was actually given December 11 instead of December 12, as specified therein. Larsen signed the statement, and Brandon and Thomas signed

as witnesses. Larsen was taken before a committing magistrate around 9:30 p.m.

The trial brought out two sharply diverging accounts of the incident of October 3:

Halverson testified he first saw the defendant in a Boise bus depot. He said he talked to Larsen on a downtown street a few minutes later, and it was agreed the two men would meet at noon in a city park. At this meeting, Halverson said, Larsen asked him to follow the defendant to the latter's apartment. Halverson testified the men committed the act complained of in Larsen's bedroom.

Larsen himself testified Halverson, whom he did not know, engaged him in conversation on a downtown street and asked where he was going. Larsen replied he was going home for lunch. Then Larsen got into his car and Halverson, without any invitation or agreement, followed in his own automobile. Halverson followed Larsen into his apartment and talked while the defendant prepared and ate a sandwich and a glass of milk. After lunch, the defendant said, he went into his bedroom, and Halverson followed. He testified Halverson made an overture toward him, and the defendant ordered the younger man out of the apartment.

In his testimony, the defendant explained his written confession by stating he was afraid he would be arrested if he didn't cooperate with the officers, that the resulting publicity would cause him to lose his job and his prospect for marriage, and that if he signed he believed the officers would let him go free, just as they had let Halverson.

The defendant was found guilty and was sentenced to serve not more than five years in the Idaho Penitentiary. This appeal is from the judgment, and from denial of a motion for a new trial.

The appellant sets forth numerous specifications of error. The principal issues raised by the defendant, and those which this Court considers germane, are these:

1. Whether the offense here charged falls within the statutory definition of the infamous crime against nature, I. C. sec. 18-6605.

2. Whether the defendant's signed statement was properly admitted in evidence, and the jury properly instructed in regard thereto.

3. Whether the testimony of the accomplice, Eldon Halverson, is sufficiently corroborated.

4. Whether the trial court erred in permitting certain questions directed to the defendant by the prosecuting attorney.

5. Allegedly *inflammatory remarks* made by the prosecutor in his argument to the jury.

6. Sufficiency of the evidence as a whole to sustain conviction.

The defendant maintains the offense charged does not fall within I. C. sec. 18-6605:

> "Every person who is guilty of the infamous crime against nature, committed with mankind or with any animal, is punishable by imprisonment in the state prison not less than five years."

The defendant maintains the statute does not define

the crime, and at common law the offense did not include a sexual penetration per os, but only penetration per anus, and was equivalent to sodomy.

This Court dealt with this precise question in the case of State v. Altwatter, 29 Idaho 197, 157 P. 256. After setting out sec. 6810 Rev. Codes, which is identical to our present I. C. sec. 18-6605, the Court said:

> "The language of this statute clearly shows that it was not the intention of the legislature to limit prosecution to the crime of sodomy and to omit the inhibition and punishment of other infamous crimes against nature.
>
> "The questions raised here have been passed upon by numerous appellate courts both in this country and in England. We feel disposed to follow the more modern decisions, which, while not so numerous, yet are, we think, the better reasoned, and in keeping with the progress of civilization.
>
> " we are of the opinion that sec. 6810 is sufficiently broad to include not only the crime of sodomy, but also all unnatural carnal copulations, whether with man or beast. "

The Court followed this rule from the Altwatter case in State v. Wall, 73 Idaho 142, 248 P. 2d 222. This principle has been recognized in Idaho for more than 40 years, and we find the defendant's attempt to overturn it is not well founded.

Turning to the question of the defendant's signed statement, the authorities of course are numerous as

to the inadmissibility of a confession obtained by duress, either physical or mental. Here the statement was made after hours of questioning, but it must be borne in mind there is ample, though conflicting, evidence for the jury to conclude that when the defendant was taken to the Fairchild home he was told (1) he was not under arrest; (2) he was free to leave; (3) he was entitled to legal counsel; (4) his statements might be used against him. The jury was given adequate instructions which stated in substance that the confession might be considered only if the jury found it was made voluntarily by the defendant, without threats and without promise of reward or immunity, and even if the jury so concluded, the confession alone would not support conviction, but it should be considered "along with all the other evidence in the case." We find no error in this regard. See authorities, infra.

Likewise, the use of Halverson's testimony was safeguarded by instructions covering the necessity for corroboration of the testimony of an accomplice. As in other criminal proceedings, such corroboration is necessary in a case of this nature. I. C. sec. 19-2117; State v. Madrid, 74 Idaho 260, 259 P. 2d 1044. The jurors were correctly instructed in substance that such testimony alone would not support a conviction, but there must be other evidence connecting the defendant with the crime, and this evidence might be furnished by the statements, admissions or confession of the defendant. This instruction is supported by the above authorities and by the case of State v. Brown, 53 Idaho 576, 26 P. 2d 131.

Larsen made several inconsistent statements which, although slight, are circumstantial and tend to connect him with the crime.

> "'Where the circumstances point to the guilt of the accused, independent of the accomplice's testimony, such circumstantial evidence may be a sufficient corroboration of the accomplice's testimony to sustain a conviction. It is not necessary that the testimony of an accomplice be corroborated in every detail. Any corroborative evidence legitimately tending to connect the defendant with the commission of a crime may be sufficient to warrant a conviction, although standing by itself it would not be sufficient proof of defendant's guilt.'" State v. Brown, supra.

There is marked conflict between the testimony of the defendant and of Halverson, regarding the incident of October 3, and between the testimony of the defendant and of the law enforcement officers regarding circumstances surrounding the purported confession. These conflicts are for the jury to resolve; and where the evidence is in conflict but is sufficient to support a conviction, the verdict will not be disturbed. State v. Gilbert, 65 Idaho 210, 142 P. 2d 584; State v. Kleier, 69 Idaho 278, 206 P. 2d 513; State v. Eikelberger, 71 Idaho 282, 230 P. 2d 696.

The appellant further urges there was error in the trial court's permitting certain questions directed to the defendant by the prosecuting attorney, and in allegedly inflammatory remarks by the prosecutor in his argument to the jury.

The questions dealt with matters opened up by defense counsel, and the defendant cannot now be heard to complain thereof.

> The rule would seem to be well settled that where a defendant in a criminal trial voluntarily takes the witness stand in his own behalf he is subject to the same rules applicable to other witnesses and may be cross-examined in regard to all matters to which he has testified on his direct examination or connected therewith. . . ." State v. Hargraves, 62 Idaho 8, 107 P. 2d 854.

See also State v. Wilson, 41 Idaho 616 at pp. 629-630, 243 P. 59; State v. Martinez, 13 Idaho 180, 195, 250 P. 230; State v. Mundell, 66 Idaho 297 at pp. 306-308, 158 P. 2d 818.

The arguments which the defense describes as inflammatory in effect urged the jurors to enforce the law and to halt an outbreak of homosexual practices in the city.

> "The general rule is that argument by the prosecuting attorney merely urging the jurors in a criminal prosecution to do their duty, and to enforce the criminal law generally or the particular law under which the prosecution was instituted, does not constitute a ground for a new trial or a reversal but is within the range of proper argument." 78 A.L.R. 1438, Annotation, Counsel's appeal to racial, religious, social, or political prejudices or prejudice against corporations as ground for a new trial or reversal, at p. 1465.

"It has been held that reference by a prosecuting attorney in his argument in a criminal prosecution, to the prevalence of crime or of crime of the character of that for which the defendant is being tried, is not improper, and does not constitute a ground for a new trial or a reversal, where it is supported by evidence, or is based on matters of public notoriety, and is not a statement of a material substantive fact as to which there is no evidence." Ibid, at p. 1467.

"In a criminal prosecution an attorney for the state properly may appeal to the jury to perform their full duty in enforcing the law, and in so doing may advance any legitimate considerations likely to instruct the jury in the performance of their duty and of the importance of enforcing the law, and may make remarks illustrating the evil consequences that might result from their failure to perform their duty; but he may not indulge in argument calculated to arouse in them fears of public disapproval, or of being regarded recreant in their duty, and which on either account tends to coerce them into a verdict of conviction. * * *" State v. Pointer, 106 Ore. 589, 213 P. 621 at p. 626.

See also Henwood v. People, 57 Colo. 511, 143 P. 373 at p. 383.

We have examined the remaining specifications of error advanced by the defendant, and find them to be without merit.

The judgment is affirmed.

PORTER, C. J., TAYLOR and SMITH, J. J., concur.

KEETON, C. J., sat at the hearing but retired prior to decision.

IN THE SUPREME COURT OF THE STATE OF IDAHO

No. 8546

| | |
|---|---|
| STATE OF IDAHO,<br>*Plaintiff and Respondent,*<br><br>vs.<br><br>GORDON LARSEN,<br>*Defendant and Appellant.* | **Petition for Re-Hearing** |

COMES NOW, The above named defendant and appellant by and through his attorney of record, Vernon K. Smith, and petitions this Honorable Court for a rehearing upon its decision filed on February 20, 1959 in the above entitled action, by the terms of which said decision the court affirmed the judgment of conviction of said defendant, and more in particular this defendant petitions for a re-hearing upon the court's decision relating to Specifications of Error X (c) and X (d)

as those specifications of error are set forth at pages 35 through 41 of appellant's opening brief, heretofore filed in the above entitled action prior to the decision thereon, and as said specifications of error are again set forth in the brief accompanying this petition.

That for grounds and reasons for said petition for re-hearing this appellant refers to page 6 of the type-written decision filed on the 20th day of February, 1959, and in particular the following portions thereof:

> "The appellant further urges there was error in the trial court's permitting certain questions directed to the defendant by the prosecuting attorney, and in allegedly inflammatory remarks by the prosecutor in his argument to the jury.
>
> The questions dealt with matters opened up by defense counsel, and the defendant cannot now be heard to complain thereof.
>
> The rule would seem to be well settled that where a defendant in a criminal trial voluntarily takes the witness stand in his own behalf he is subject to the same rules applicable to other witnesses and may be cross-examined in regard to all matters to which he has testified on his direct examination or connected therewith. State v. Hargraves, 62 Idaho 3, 107 P. 2d. 854.
>
> "See also State v. Wilson, 11 Idaho 616 at pp. 629-630, 243 P. 359; State v. Martinez, 43 Idaho 180, 195, 250 P. 239; State v. Mundell, 66 Idaho 297 at pp. 306-308, 158 P. 2d. 818.

> The arguments which the defense describes as inflammatory in effect urged the jurors to enforce the law and to halt an outbreak of homosexual practices in the city."

And after making such reference this petitioner alleges that the reasoning assigned by the court for its decision was wholly inapplicable and was not pertinent to the issue involved.

In its decision the court approved the line of cross-examination that was conducted by the Prosecuting Attorney when the defendant was on the stand and contended, "The questions dealt with matters opened up by defense counsel and the defendant cannot now be heard to complain thereof." That was not the basis of the assignment of error, nor was there any authorities attempted to be submitted along that line nor did the defendant ever argue along that line. The issue involved was that after the defendant had taken the stand and testified in his own defense, and in so testifying stated that he, the defendant, was not an homosexual the prosecutor undertook to engage in a long series of questions in which questions the prosecutor implied that the defendant had admitted to the Prosecuting Attorney that he, the defendant, had had numerous homosexual engagements and experiences. The defendant denied that he ever made any such statement to the Prosecuting Attorney. The Prosecuting Attorney did not take the stand, nor did he produce any other witnesses to rebut the defendant's denials along these lines. Such conduct on the part of the Prosecuting

Attorney has been held reprehensible and reversible error in many of the Supreme Courts as will appear from the brief filed in support of this petition.

As to the Assignment of Error No. X (d), relating to the inflammatory and improper argument of the Prosecuting Attorney, this Supreme Court stated in its opinion that, "The arguments, which the defense described as inflammatory, in effect urge the jurors to enforce the law and to halt an outbreak of homosexual practices in the city." This was not the point urged in the assignment of error at all. The assignment of error specifically related to the prejudicial conduct of the Prosecuting Attorney in his closing argument to the jury by his inflammatory and improper linking of the defendant with other homosexuals in the community when the only evidence of such association by this defendant with such other persons was the unsworn, prejudicial, improper and reversible erroneous questions, which had been propounded by the prosecutor himself. In other words, the appellant did not complain, nor did he assign as error the fact that the Prosecuting Attorney urged the jurors to enforce the law. What the defendant objected to and assigned as error was the prosecutor's argument that the defendant was linked with a ring of homosexuals through association, when there was no evidence in the record to sustain such an argument.

This petition for re-hearing is based upon all of the records, files, transcripts and briefs filed in the above entitled action, and in particular specification of error X (c) and X (d) at pages 35 through 41 of appellant's

brief heretofore filed in this action, together with the supporting brief for this petition for re-hearing, filed concurrently herewith.

Respectfully submitted.
VERNON K. SMITH
ney for Appellant
40 Main Street
Boise, Idaho

Copy of the foregoing instrument received, and service acknowledged this 12th day of March, 1959.

FRANK BENSON
Attorney General
State of Idaho

By Wm. E. Swope

BOISE, IDAHO, MAY 13, 1959

No. 8546

STATE OF IDAHO,
*Respondent,*

v.

GORDON LARSEN,
*Appellant.*

Denied Appellant's motion to recall remittitur.

BOISE, IDAHO, APRIL 2, 1959

No. 8546

STATE OF IDAHO,
*Plaintiff-Respondent,*

v.

GORDON LARSEN,
*Defendant-Appellant.*

Justice McQuade announced the decision in this cause February 20, 1959, to the effect that the judgment of the District Court of the Third Judicial District of the State of Idaho, in and for Ada County, is affirmed.

IT IS NOW THEREFORE SO ORDERED.

# SUPREME COURT OPINIONS

On Denial of Petition for Rehearing

April 2, 1959

Re: State of Idaho v. Gordon Larsen

No. 8546

Petition for Rehearing Denied

McQUADE, J.

In the petition for rehearing, appellant urges a reversal because of what is termed impeaching examination of appellant by the prosecutor without adducing evidence in support thereof. Two objections were made during this examination: one that a particular question was incompetent, irrelevant, and no foundation laid, and later on a second objection that the testimony was beyond the scope of the direct examination, although admittedly invited by the direct examination of defendant. Both objections were overruled.

This Court has held that where impeaching questions are not objected to, and no adverse rulings obtained, there is no error. State v. Boyatt, 59 Idaho 771, 87 P. 2d 992.

The petition for rehearing is denied.

PORTER, C. J., and TAYLOR and SMITH, J., concur.

SUPREME COURT OF THE UNITED STATES

*No. ..., October Term, 1958.*

---

GORDON LARSEN,
*Petitioner,*

v.

STATE OF IDAHO

---

## ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI.

---

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 31, 1959.

(S) W. O. DOUGLAS
*Associate Justice of the Supreme Court of the United States.*

Dated this 29th day of July, 1959.

FILE COPY

FILED
JAN 25 1960
JAMES R. BROWNING, Clerk

# In the Supreme Court of the United States

No. 357, O.T., 1959

GORDON LARSEN,
*Petitioner,*

vs.

STATE OF IDAHO,
*Respondent.*

# Petition for Rehearing Upon Petition for Writ of Certiorari Heretofore Filed

TO OBTAIN A RECONSIDERATION OF THE PETITION FOR WRIT OF CERTIORARI TO REVIEW A FINAL JUDGMENT OF CONVICTION HERETOFORE AFFIRMED BY THE SUPREME COURT OF THE STATE OF IDAHO, A COURT OF LAST RESORT IN THE STATE OF IDAHO

VERNON K. SMITH
Boise, Idaho
J. M. LAMPERT
Boise, Idaho
Member of the Bar of the Supreme Court of the United States
*Attorneys for Petitioner*

FRANK BENSON
Attorney General
State of Idaho
WILLIAM C. RODEN
Prosecuting Attorney
Ada County, Idaho
*Attorneys for Respondent*

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## APPENDIX

See original petition for writ of Certiorari for copies of State Court decisions. Therefore no appendix is attached hereto.

## TABLE OF CASES

Rachin v. California, 342 U.S. 165 (173)

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Chambers v. Florida, 309 U.S. 227

White v. Texas, 310 U.S. 530

Ward v. State of Texas, 316 U.S. 1139

Cranor v. Gonzales, 226 Fed. Rep. 2nd 83

U.S. v. Cummings, 154 Fed. Supp. 663

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Rule 58 (2), 23, 19 Revised Rules of the Supreme Court of the United States

# In the Supreme Court of the United States

No. 357, O.T., 1959

GORDON LARSEN, *Petitioner,*

vs.

STATE OF IDAHO, *Respondent.*

## Petition for Rehearing Upon Petition for Writ of Certiorari Heretofore Filed

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

COMES NOW, The above named petitioner, Gordon Larsen, by and through his attorneys, and files this petition for rehearing upon the petition for writ of certiorari heretofore filed for the purpose of obtaining a review by this Honorable Supreme Court of the United States of America of that certain judgment of the Supreme Court of the State of Idaho, being a court of last resort in the State of Idaho, in a criminal case wherein judgment of conviction of this petitioner upon a charge of a felony was affirmed, and in accordance

with Rule 58(2), Revised Rules of the Supreme Court of the United States of America, the petitioner sets forth the following:

I

In order to be brief, as required by the Revised Rules of the Supreme Court of the United States of America, reference is made to the petition for writ of certiorari, heretofore filed in the above entitled court, in which said petition the pertinent facts and statements relating to jurisdiction, grounds, statutory provisions, questions presented, statement of the case, and other facts, as the same are required by Rule 23, Revised Rules of the Supreme Court of the United States were set forth.

II

In this petition for rehearing the petitioner will not re-argue the grounds heretofore urged for writ of certiorari, as the same were set forth in the original petition for writ of certiorari.

This petition for rehearing shall be limited exclusively to other substantial grounds available to the petitioner, which were not previously presented, as such is authorized by the following: RULE 58 (2), REVISED RULES OF THE UNITED STATES SUPREME COURT: Schrieber-Schroth Co., v. Cleveland Trust Co., 305 U.S. 47; 49 Sup. Ct. 8.

III

In presenting these other substantial grounds available to the petitioner, which were not previously presented in our original petition for writ of certiorari,

we follow Rule 23, Revised Rules of the Supreme Court of the United States, insofar as such rule would require certain pertinent and material facts without repetition.

A

See p. 2, original petition for writ of certiorari.

B

See p. 2, original petition for writ of certiorari.

C

QUESTIONS PRESENTED FOR REVIEW

(1) In order to obtain evidence with which to convict a person of crime, may the law enforcement officers of the State of Idaho resort to long and extended psychological torture of an accused to obtain an admission or confession from such accused?

(2) In order to obtain a confession or admission from a person accused of crime, may the law enforcement officers make threats and promises of immunity in order to obtain such a confession?

(3) Where a confession or admission is obtained from a person accused of a crime after extended inquisition and psychological torture, and through the use of threats and promises of immunity, may such a confession be used at all in a trial of such accused, as evidence of his guilt?

(4) When law enforcement officers of a state have obtained a confession or admission through psychological torture, through threats, and by offering promises of immunity, and thereafter offer such confession or

admission as evidence in a proceeding against such accused, and through the use of which confession or admission in evidence the accused is convicted of crime and thereafter sentenced to the penitentiary of the state, do not such circumstances constitute a violation of the 14th Amendment of the Constitution of the United States, through the taking of liberty of a citizen without due process of law?

(5) Does not the due process of law clause of the Constitution of the United States of America command that confessions in order to be admissible in evidence must be voluntarily made, without threat or promise of immunity?

D

See p. 7, original petition for writ of certiorari.

E

A concise statement of the case containing the facts material to a reconsideration of the questions presented is as follows:

During the months of November and December, 1955, there was a veritable "witch hunt" going on in Boise City, Ada County, Idaho. During said months the front page news stories daily related to a sensational homosexual investigation that was being conducted by the then Prosecuting Attorney. (See pp. 258, 295, Tr., heretofore certified to this Honorable Court from the Supreme Court of the State of Idaho.) Approximately 18 persons in all were arrested, with pictures and front page stories pertaining to each case.

The petitioner was about the fourteenth or fifteenth such person to be arrested.

On the 11th day of December, 1955, the petitioner was living in an apartment in Boise, Idaho, and on that Sunday afternoon a police officer knocked at his door and told petitioner that an officer downtown wanted to talk to him (the petitioner). The petitioner dressed and accompanied the police officer to a private dwelling house where the Sheriff of Ada County, one Doc House, the Boise City Police Chief, one James Brandon, a special investigator by the name of Bill Fairchild and an unnamed police officer were waiting. It was about 2:00 o'clock in the afternoon when the petitioner was taken to this house, at which time an inquisition of the defendant was begun. This inquisition continued until about 8:30 at night, when the police officers finally obtained an equivocating admission or so-called "confession" from the petitioner.

For the sake of brevity, we will not quote extensively from the transcript, but direct this Honorable Court's attention to pp. 114-130 of the transcript of the trial, heretofore certified to this Honorable Court from the Supreme Court of the State of Idaho. It is represented that this transcript of the record and testimony will show substantially the following facts.

Petitioner was a young man of about 32 years, was employed by the Mode Department Store in Boise, Idaho, and at said time was engaged to be married during the following month. On the 11th day of December, 1955, two policemen came to the apartment

of the petitioner, showed him their badges and told him that they wanted to talk to him. They took him in a police car to a private residence in Boise, Idaho. They did not talk to him en route to the private residence. At the private residence there was the Chief of Police of Boise City, the Sheriff of Ada County and a private investigator by the name of Fairchild waiting. The room was darkened with the window shades drawn. There were two desks back to back with a mirror sitting on the desk in front of the place where petitioner was to be seated. The fireplace was burning. The Chief of Police, Sheriff and Fairchild commenced their interrogation by accusing the petitioner of being an homosexual. He repeatedly denied the accusations. The interview continued for a period from about 2:00 o'clock on Sunday afternoon until about 8:30 o'clock P.M. when it culminated in the office of the Prosecuting Attorney, during which time the officers repeatedly called petitioner a liar, asked each other if they didn't think the petitioner was a liar; and finally produced a man by the name of Halverson, who claimed to have had an homosexual relation with the petitioner. The petitioner called Halverson a damn liar, whereupon the police officers compelled petitioner to sit down and "shut up." After Halverson freely claimed that he himself was an homosexual and that he had had an homosexual experience with the petitioner, Fairchild gave Halverson money, told him that he had been a good boy and to go on home. The interview continued, whereupon the police officers threatened petitioner that

if he didn't "cooperate" they would "make it tough" on him, and if he would cooperate and admit to this one little incident that they would help him. At that time there was much publicity concerning about 11 prior arrests of other people for alleged homosexual activities and there had been repeated stories in the newspapers concerning the arrest of these other individuals, together with numerous news stories to the effect that a new school was being set up by the Department of Health to work with and to treat homosexuals. It was then represented to the petitioner that if he would merely cooperate with them that they would help him by sending him to this school and implied that no misfortune would befall him. Petitioner continued to protest his innocence. Finally Fairchild made a simulated call to someone, informing this someone that the petitioner wouldn't cooperate and that, therefore, they would have to "make it tough" on him. The record discloses that petitioner was numb with fright, he had an abiding faith and belief that if he continued to resist the insistence of these police officers that they would "make it tough" on him by charging him with this offense anyway, and that he would be held up to public scandal by newspaper publicity, that he would lose his job, that his reputation and forthcoming marriage would be destroyed. The record further shows that he had an abiding belief that if he would simply cooperate with the officers and admit to something that he didn't do, that he would thereby escape a wrongful accusation and would probably be

treated in the same manner as Halverson had been treated: that is to say, that he would be let go. The record further discloses that petitioner then finally said "O.K.," that he would cooperate, but still did not admit any implication in the alleged offense. The record then discloses that petitioner was taken to the Prosecuting Attorney's office, whereupon the Deputy Prosecuting Attorney himself wrote up a detailed statement and handed it to the petitioner to sign. In this statement the Deputy Prosecuting Attorney detailed an act of homosexuality. The record further discloses that the petitioner even then was reluctant to sign it unless they would add to it, "This incident involved 'playing around' and was not an attempt on my part to 'blow' Halverson." This was then added, and finally, out of desperation and at a time when the petitioner claims that no such act had occurred at all, he signed the statement, believing that by cooperating with the authorities that he would be released and would probably be sent to this so-called "school": whereas, if he did not cooperate they would prosecute him anyway, even if he had not committed the act of which they were accusing him. In this state of desperation, which was brought on by threats, promises and assurances by the police officers, the record discloses that the petitioner was in such a state of fright and desperation that he believed he had no alternative but to admit to something that he had not done in the belief that he would thereby avoid being publicly charged and disgraced.

The record further discloses that this so-called "investigation" almost amounted to a "witch hunt" in Boise City during the fall and winter of 1955, during which practically every single man was suspected and gossiped about as being an homosexual, and that the newspapers bristled day after day with stories concerning arrests which appeared almost daily in connection with these matters.

We further represent to this Honorable Court that at the time of trial the before mentioned Eldon Halverson was called as a witness. This witness, namely, Eldon Halverson, was described in the transcript by Dr. John Butler as being a far-developed sexual psychopath, who was possessed of little or no conscience, and as a person who had a high potentiality to lie concerning the activities of any other person when such statements might assist him, the said Eldon Halverson, in his own difficulties. (See pp. 253-257, Tr., heretofore certified to this Honorable Court by the Supreme Court of the State of Idaho.) This Eldon Halverson was an admitted homosexual, who testified and claimed that he had had an homosexual relationship with the petitioner, although the record unequivocally discloses that the said Eldon Halverson was never charged because of his admitted violations of the law. (See pp. 260-263, Tr., heretofore certified to this Honorable Court by the Supreme Court of the State of Idaho.) The record further discloses that Dr. John Butler was at said time the Director of the Mental Health Division of the State of Idaho, which department dealt with

matters relating to the study and rehabilitation of persons suffering from mental disorders of all kinds, including sexual psychopaths, and that Dr. Butler was eminently qualified by experience in the field of psychiatry to express such an opinion. (See pp. 253-254, Tr., heretofore certified to this Honorable Court by the Supreme Court of the State of Idaho.)

In this state of the record Eldon Halverson was an admitted accomplice, if such offense ever occurred, and that under the laws of the State of Idaho no person can be convicted upon the uncorroborated testimony of an accomplice. The statute in the State of Idaho relating to this matter is Sec. 19-2117, I.C., which reads as follows:

> "A conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence, which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient, if it merely shows the commission of the offense, or the circumstances thereof."

In order to corroborate the testimony of this Eldon Halverson the State produced into evidence the so-called "confession," which was obtained after extensive interrogation through threats, through promises and through psychological torture. It is contended that this so-called "confession" was in fact not a true confession at all, but that the same amounted to an equivocating admission of guilt, together with a prompt denial of guilt, and that the same was given and signed when

the accused was in a state of numbness from fright, fearing that if he continued to resist the officers that he would be charged with the offense nevertheless, whereas, if he would cooperate with them; he believed that he would probably be treated in the same manner as the said Eldon Halverson had been treated; that is to say, if he would admit to this incident, even though the same were not true, he would be thereby pleasing the police officers who would probably send him to this so-called "school," and that no misfortune would befall him. In this regard, during the long interrogation of your petitioner Eldon Halverson was called in to identify the petitioner, and in the presence of the petitioner the said Eldon Halverson claimed that he had had an homosexual experience with the petitioner, and then in the presence of the petitioner Bill Fairchild gave Eldon Halverson money to buy gas with, told him he was a good boy and that he could go home.

The record further discloses that at the time of this interrogation of Gordon Larsen there was a large pile of magnetic recording tapes in the room and that during the course of the interview with Gordon Larsen a tape was actually changed. (See p. 129, Tr., heretofore certified to this Honorable Court by the Supreme Court of the State of Idaho.) During the trial repeated efforts were made to obtain these recording tapes to show exactly the nature and extent of the psychological torture, which was inflicted upon the petitioner, and to obtain exactly what promises and threats were made, but these attempts to obtain the tapes were continuous-

ly frustrated. (See testimony of Chief of Police Brandon, pp. 77, 78, 98-100, Tr., heretofore certified to this Honorable Court by the Supreme Court of the State of Idaho.) (See also the examination of Sgt. Quinton, pp. 53-55, Tr., heretofore certified to this Honorable Court by the Supreme Court of the State of Idaho.) As a matter of fact, petitioner even attempted to obtain these recording tapes by subpoena duces tecum served upon Chief of Police James Brandon. (p. 107, Tr., heretofore certified to this Honorable Court by the Supreme Court of the State of Idaho.) A subpoena duces tecum was also served upon Sheriff House to obtain these tape recordings. (p. 110, Tr., heretofore certified to this Honorable Court by the Supreme Court of the State of Idaho.) A similar subpoena duces tecum was issued and outstanding, but could not be served upon Bill Fairchild, the third man in charge at this so-called "inquisition," but in each case, House and Brandon denied that any such tape was taken, although they admitted that there were tapes there for the purpose of obtaining admissions, which might be elicited from the subjects interviewed. The efforts on the part of the petitioner to obtain this information and facts from Sergeant Quinton were frustrated by the rulings of the court and Bill Fairchild could not be found.

F

This error of denial of due process of law was raised in the trial court by motion for new trial, and in particular at page 243 of the Transcript under paragraph

VI of the motion for new trial, and at pages 244-246 of the Transcript under paragraph VII of the motion for new trial, therein contained, as said Transcript has been certified to this Honorable Court from the Supreme Court of the State of Idaho.

G

Not applicable.

H

For a direct and concise argument amplifying the reasons relied upon for a petition for rehearing on the petition for writ of certiorari, we state as follows:

Under paragraph (E) above, petitioner has set forth the facts surrounding the circumstances under which a certain so-called confession was obtained from petitioner on the day of his arrest. We believe that a careful analysis of the transcript will clearly disclose that this so-called confession was not obtained in accordance with either the letter or the spirit of the due process law clause of the 14th Amendment to the Constitution of the United States.

The background and circumstances of the community deserve prominent consideration in reviewing the legality of this so-called confession. As heretofore pointed out, there was a veritable "witch hunt" going on in Boise, Idaho, relating to an homosexual investigation. Over a period of 2 or 3 weeks the front pages of the newspapers bristled with news stories as each day a new charge was brought against someone in the area. In all, there were about 14 of these news stories prior to the time that the petitioner was interviewed.

There was story after story relating to the foundation and establishment of a so-called "school," which was being set up in the community for the purpose of dealing with these homosexual cases, where they could be given psychological treatment, rather than to be prosecuted and sent to the penitentiary. The homosexual investigation was a constant topic of conversation in practically every home, office, bar, store, and place where people congregated and talked during this period of time.

It must be immediately apparent to this Honorable Supreme Court that when the petitioner was taken into custody and was interviewed by the Chief of Police, the Sheriff, this Bill Fairchild and Sergeant Quinton that the normal reactions of any human being would immediately stir a feeling of desperation and fright in that person. It must be immediately apparent to this Honorable Supreme Court that the petitioner in this case must have had the same reactions as any person would have when accused of being an homosexual during this time when this inquisition was going on. It must be further apparent to this Honorable Supreme Court that under the circumstances the petitioner would visualize that he was about to become the victim of scandalous publicity in connection with so terrible and so infamous an accusation as that of being an homosexual, and certainly it must be apparent to this Honorable Court that in this state of desperation and fright that it must have passed through his frustrated mind that tomorrow and the next day it may be his

own picture that would appear on the front page of the local newspapers, holding him up to shame and disgrace, with resulting loss of friends, humiliation and a destruction of his impending marriage.

With the scene and background of circumstances so set, the police officers started their inquisition of the petitioner. True, they did not beat him, they did not torture him with physical torture, they did not resort to other means of violent medieval physical pain or torture to obtain an involuntary admission from the petitioner, but we submit that it has been the established rule of the Supreme Court of the United States that in matters of criminal prosecution, the State and its police representatives must be fair with the defendant. This established rule has found its basis in the 14th Amendment of the Constitution of the United States, which provides that no person may be denied of his liberty without being accorded due process of law.

This Honorable Supreme Court and the Federal System of courts have had before it numerous cases relating to the abuses of persons accused of crime, wherein police officers have obtained confessions through force, threats and promises, and the rules in this regard have been laid down and established in the following cases:

Rochin v. Calif., 342 U.S. 165 (173);
Brown v. Mississippi, 297 U.S. 461;
Chambers v. Florida, 309 U.S. 227;
White v. Texas, 310 U.S. 530;

Ward v. State of Tex., 316 U.S. 1139;
See: Cranor v. Gonzales, 226 Fed. Rep. 2d 83 (9th Circuit);
See: U.S. v. Cummings, 154 Fed. Supp. 663.

In the above cited cases many of these cases demonstrate real brutality of beatings, whippings and other types of physical violence and cruelty that were resorted to by the police representatives to obtain admissions and confessions of the victims, who were accused of crime, but we submit that physical torture alone is not the test in determining whether a confession or admission was obtained in violation of the due process of law clause of the 14th Amendment of the Constitution. Generally speaking, to be admissible at all a confession must be obtained voluntarily from the accused. If it is not a voluntary statement made by the defendant, then it doesn't have the respectability of being a confession at all. The confession must be made without inducements of immunity.

In this case before this Honorable Supreme Court, we submit that the transcript clearly and distinctly shows that the entire circumstances created a situation where psychological torture could have been and was in fact resorted to on the part of police officers to reduce this petitioner to such a state of emotional frustration that the petitioner was willing to do almost anything in order to avert the catastrophe that might befall him. The record clearly and distinctly shows that in this state of numbness from fright the petitioner believed that if he didn't cooperate with these police

officers that they would charge him anyway, that he would be held up to public scandal, public ridicule and disgrace. On the other hand, throughout the interview they repeatedly led him to believe that there was a so-called "school," being set up in the community to treat these homosexuals. They repeatedly led him to believe that if he would cooperate with them that they wouldn't hurt him, that they would help him. The petitioner interpreted this general situation to mean that if he would "go along" with these police officers, that if he would cooperate with them, that he might very probably attain the obvious immunity, which they had given to Halverson, who was an admitted homosexual. After all, the record is clear and this Honorable Court must certainly appreciate that in the petitioner's very presence Halverson unequivocally claimed that he had had an homosexual act with the petitioner, that when the petitioner called him "a damn liar" and the police officers made the petitioner sit down "and shut up," that the police officer then gave Halverson money, told Halverson that he was a good boy, told Halverson that he could go. How much more clear would it have to be to anyone that the petitioner was certainly being induced to make a statement against himself, which very probably might not even be true, to avoid the catastrophic destruction of his reputation, good name and position that was threated to fall upon him like an avalanche. Granted, that I believe that if I had been in Gordon Larsen's position that I personally could have withstood this pressure, and granted, that I be-

lieve that there are many other men of a similar disposition and experience that I am fortunate enough to have, who could have also withstood this torment, torture and emotional frustration. On the other hand, however, the dispostions of all people are not alike, and certainly the experience of all men is not similar. I happen to have the good fortune of having some notion that I do have rights and my personal and professional life for more than 20 years has been a continuous pattern of resistance to pressures, which inevitably develop in the ordinary general practice of law. But all men are not so equipped with the same training, experience and inherent strength and disposition to resist pressures. Gordon Larsen, like so many millions of other gentle people, was completely unfamiliar with this type of police tactics. He had no awareness or experience as to how police officers treat suspects and how far they may go to accomplish their determined goals to crucify members of the community in a "witch hunt," which heaped story upon story of sensational publicity. Gordon Larsen's reactions, Gordon Larsen's submission and Gordon Larsen's destruction under the circumstances would have been the inevitable result to any one of the many millions of people, who found themselves trapped in the same circumstances of being the subject of an inquisition by four police officers who held themselves out with authority to deal with his life and liberty as met their particular pleasure.

Heretofore in our petition for writ of certiorari, we set forth a course of conduct on the part of the Prose-

cuting Attorney, which occurred during the course of the trial and before the jury, which appeared to us to be the most manifest and most deliberate type of unfairness in a criminal proceedings that could be visited upon an unfortunate accused of crime. We fully appreciate that the procedure for review of the decisions of the court of last resort of any state is not a matter of right. We fully appreciate that a Federal question must be involved and that that Federal question must be one of some importance under Rule 19, Revised Rules of the Supreme Court of the United States. In our petition for writ of certiorari we contend, and we did believe, that the procedure resorted to by the Prosecuting Attorney did amount to a denial of due process of law under the Constitution of the United States, but must admit that very possibly under the press of business this Honorable Supreme Court may well have felt that that matter in and of itself was not sufficient to justify the taking of jurisdiction of this case.

Here, however, we now submit another Federal question—a type of Federal question, which has been before this Honorable Supreme Court in many different degrees of torture, threats and promises of immunity. We do earnestly believe that this does involve a Federal question of the denial of due process of law. In our search of authorities we frankly admit that most of the cases dealing with this general subject involve a more aggravated type of physical violence. Here, however, we have a situation where no physical

violence was used, but there was an abundance of psychological torture. We, therefore, believe that not only does this matter involve a Federal question, which justifies this Honorable Court for taking jurisdiction, but we sincerely and earnestly urge that this has become a question of importance so as to give this Honorable Supreme Court of the United States jurisdiction to express the law relating to whether or not police officers may use psychological torture upon an unfortunate accused or suspected of crime in order to drag from his unwilling lips an admission or confession to be used later against that accused to form the basis for obtaining an unjust conviction of him.

I

In order to avoid repetition, we direct the Honorable Court's attention to the original petition for writ of certiorari wherein the opinions of the Supreme Court of the State of Idaho relating to the original opinion, the opinion on petition for rehearing, and the opinion on motion to recall remittitur were appended.

Respectfully submitted,

VERNON K. SMITH

J. M. LAMPERT
(Member of the Bar of the Supreme Court of the United States)
*Attorneys for Petitioner*

## CERTIFICATE OF COUNSEL

THIS IS TO CERTIFY, That in accordance with Rule 58, Revised Rules of the Supreme Court of the United States of America, the undersigned, being the attorneys for petitioner, do certify and represent to this Honorable Supreme Court that this petition for rehearing is presented in good faith in the belief that a Federal question is involved and that such Federal question may be of such importance to justify consideration by this Supreme Court of the United States upon writ of certiorari, and further certify that this petition for rehearing is presented in good faith and is not prosecuted or presented for purposes of delay.

We further certify that this petition has been restricted to the grounds permitted under Rule 58, Revised Rules of the Supreme Court of the United States of America.

Dated this 30th day of December, 1959.

VERNON K. SMITH

J. M. LAMPERT

*Attorneys for Petitioner*